(3)

No. 87-2071

In The

Supreme Court of the United States

October Term, 1988

David Rodriguez Diaz, et al.,

Petitioners,

v.

Mexicana De Avion, S.A., and
Boeing Commercial Airplane Company,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

By affirming the district court's discretionary decision to dismiss the plaintiffs' claims on the ground of forum non conveniens, did the court of appeals depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

PARTIES

Petitioners' identification of the parties to this appeal is correct except that respondent The Boeing Company ("Boeing") is misidentified as "Boeing Commercial Airplane Company."

STATEMENT TO COMPLY WITH RULE 28.1

Boeing has the following subsidiaries that are not wholly owned: ARGOSystems, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OPINIONS BELOW

The Appendix to the Petition for a Writ of Certiorari omits the unpublished opinion of the United States District Court for the Western District of Texas, San Antonio Division, denying plaintiffs' motion for reconsideration, which was entered by the Honorable H.F. Garcia on April 17, 1987. The text of that opinion is set forth in the Appendix to this Brief in Opposition.

STATEMENT OF THE CASE

1. *The Accident*

This lawsuit arose out of the March 31, 1986 crash of Mexicana Flight 940. The crash occurred approximately twenty-one minutes after the airplane had departed Mexico City en route for its first scheduled stop, Puerto Vallarta. The crash site was in the mountains about sixty miles west of Morelia, the capital city of the Mexican state of Michoacan. The airplane, a Boeing 727, was under the direction of Mexican air traffic control when the accident occurred.

2. *The Investigation*

The post-accident investigation was conducted by Mexican government authorities, in accordance with applicable international treaties. The Direccion General de Aeronautica Civil ("DGAC"), which is headquartered in Mexico City, placed Ing. Inrique Mendez Fernandez in charge of the investigation. Representatives of the United States National Transportation Safety Board ("NTSB"), the airline ("Mexicana") and the airplane manufacturer

("Boeing") visited the scene of the crash and provided technical information as requested by the DGAC investigators. The NTSB's role was limited, and that agency has no plans to issue a report on the accident.

Virtually all of the evidence and information gathered in the course of the DGAC investigation is located in Mexico. This includes statements taken from eyewitnesses; audio tapes and transcripts of the air traffic controllers' communications with the flight crew; the aircraft wreckage and other physical evidence from the crash site; readouts from the aircraft's cockpit voice recorder and flight data recorder; reports on the results of tests performed on salvaged components; and airline and Mexican government records concerning aircraft operation, maintenance, and flight crew and mechanic training.

The only aspect of the investigation that occurred outside Mexico was the evaluation of several pieces of wreckage by B.F. Goodrich in Ohio and by Boeing in Washington. These evaluations were carried out at the request and under the direction of the Mexican DGAC.

The DGAC issued a formal, public report on the results of its investigation late in May, 1987. The DGAC investigators concluded that the crash resulted from an inflight fire caused by the explosion of an overheated tire. In the course of the investigation, it was discovered that Mexicana had been inflating all its airplane tires with dry air, which contains oxygen and will support combustion, rather than with nitrogen, which has been recommended by Boeing since 1974 because it is inert. Mexicana procedures were amended to conform with Boeing's tire inflation recommendations shortly after the accident.

3. *The Lawsuit*

This action was originally commenced in state court in Bexar County, Texas, by the personal representatives of sixteen Mexican nationals who died in the crash. All the plaintiffs were citizens and residents of Mexico. Named as defendants were Mexicana, which is based in Mexico and owned by the Mexican government, and Boeing, a Delaware corporation with its principal place of business in the State of Washington.

Mexicana removed the case to federal court, pursuant to the Foreign Sovereign Immunities Act, and filed a motion to dismiss on the ground that it was immune from suit as a foreign sovereign. Plaintiffs opposed that motion and moved to amend their complaint to add claims on behalf of four additional decedents, all members of the Rivaud family, who were alleged to be American citizens.[1] When Boeing was served shortly thereafter, it immediately moved to dismiss the action on the ground of forum non conveniens.

On January 23, 1987, the district court granted plaintiffs' motion to amend the complaint to add claims on behalf of the Rivauds and dismissed the action, in its

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[1] Mr. and Mrs. Rivaud were born in Mexico and, according to their Mexican death certificates, maintained a residence there at the time of their deaths. Mr. Rivaud was a naturalized U.S. citizen and his wife was a Mexican citizen with resident alien status in the United States. Their two children apparently were dual nationals. The family was on an extended visit to Mexico when the accident occurred.

entirety, on the ground of forum non conveniens.[2] The dismissal was made subject to the following conditions: (1) that defendants submit to service of process and jurisdiction in the appropriate court in Mexico; (2) that defendants formally waive in the Mexican proceeding any statute of limitations defense that had matured since the commencement of this action; (3) that defendants make available all relevant witnesses and documents; and (4) that defendants agree to satisfy any judgment rendered by the Mexican court. The district court premised its decision on a careful balancing of the public and private interest factors identified in this Court's opinion in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947).

Plaintiffs moved the district court for reconsideration of its January 23, 1987 decision, relying upon several new arguments. In particular, plaintiffs argued that no adequate remedy was available in the Mexican courts and that any award obtained there would be difficult or impossible to enforce. The district court considered these new arguments, and the new evidence tendered to support them, and found them all to be without merit.[3]

Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit, which held that the forum non conveniens dismissal was within the district court's

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[2] The court denied without discussion Mexicana's motion to dismiss under the Foreign Sovereign Immunities Act.

[3] The text of this Order, entered on April 17, 1987, is set forth in the Appendix.

discretion and affirmed. The court of appeals determined that its opinion should not be published, pursuant to Local Rule 47.5, because "[t]he publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession."

REASONS FOR DENYING THE WRIT

Boeing respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the court of appeals' decision in this case because:

(1) the question presented in the Petition does not satisfy any of the criteria for review on certiorari under Rule 17.1, and

(2) the court of appeals was entirely correct in its holding that the forum non conveniens dismissal below was within the sound discretion of the district court.

I. THE PETITION FAILS TO IDENTIFY ANY ISSUE WORTHY OF THIS COURT'S REVIEW ON CERTIORARI.

Supreme Court Rule 17.1 identifies the considerations which may render a particular matter appropriate for this Court's review on certiorari. The Petition makes no attempt to bring this case within the purview of that Rule. Petitioners identify no decision by another federal

court of appeals which conflicts with the decision below.[4] Nor do they identify an important federal question which was decided below in a way that conflicts with applicable decisions of this Court or of any state court of last resort. Instead, they merely urge this Court to review the facts in the record and second-guess the trial court's discretionary application of the well-settled doctrine of forum non conveniens.

This Court should not involve itself in policing routine exercises of discretion in the lower courts unless, in the terms of Rule 17.1, such a court "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Not only did the courts below not depart in such a fashion from the accepted course of judicial proceedings in this case, they adhered scrupulously to the well-settled principles of forum non conveniens which this Court established more than forty years ago. *See Gulf Oil Corp., supra*. For this reason alone, the question petitioners have presented for review is not worthy of this Court's attention.

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[4] Petitioners claim the decision below is inconsistent with other decisions in the Fifth Circuit. Even if this were true, and Boeing submits that it is not, resolution of perceived conflicts within a single circuit has never been recognized as an appropriate reason for granting a writ of certiorari. The Fifth Circuit has its own means of resolving conflicts which may arise between decisions of separate panels.

II. THE COURT OF APPEALS WAS CORRECT IN DECLINING TO SUBSTITUTE ITS JUDGMENT FOR THE JUDGMENT OF THE DISTRICT COURT IN AN AREA THAT IS PROPERLY COMMITTED TO THE DISTRICT COURT'S SOUND DISCRETION.

The application of the doctrine of forum non conveniens in a particular case is a matter properly committed to the trial court's discretion. Where the trial court has considered the relevant public and private interest factors, and balanced them against one another in a reasonable fashion, its decision is entitled to "substantial deference." *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). The role of the court of appeals in reviewing such a decision is limited to determining whether there has been "a clear abuse of discretion." *Id.*

The court of appeals performed its function below exactly as this Court has prescribed, and it properly concluded that the trial court's discretionary balancing of the public and private interest factors relevant to the forum non conveniens inquiry should not be disturbed. The petitioners fail to identify a single reason why this Court should undertake a similar review now, except that they disagree with the conclusion reached by the district court. The conclusion itself is the only thing the petitioners can challenge, because they cannot challenge the legal standard the court applied. That legal standard, taken essentially verbatim from this Court's decisions in *Gulf Oil Corp.* and *Piper Aircraft Co., supra,* calls for the district court to weigh the evidence relating to a specified set of public and private interest factors.

The overwhelming weight of the evidence bearing on these public and private interest factors pointed to Mexico as the most convenient forum in which to fairly and efficiently resolve the merits of the plaintiffs' claims. Factors which properly influenced the lower court's decision included the following:

1. The Mexican forum is available because both defendants have agreed to waive any jurisdictional objections and to honor any adverse judgment rendered by a Mexican court.

2. The Mexican forum is adequate because Mexican law provides a cause of action against both the airline, Mexicana, and the manufacturer, Boeing. The applicable provisions of Mexican substantive law were proved below through an affidavit submitted by the President of the Mexican Bar Association.

3. Plaintiffs' damage claims will be governed by Mexican law, under applicable choice of law rules, whether they are tried in Mexico or in Texas. The Mexican courts are obviously more familiar with substantive Mexican law than a federal court in Texas would be.

4. The goal of resolving disputes of predominantly local interest in a local court can be achieved only if the case is tried in Mexico.

5. Most of the physical evidence relevant to the accident is located in Mexico, and could not be reached by judicial process if this case were to be litigated in Texas. Accordingly, not only would trial in Mexico be convenient, but it would ensure fundamental fairness by affording all parties equal access to the evidence.

6. No witnesses, documents or other items of evidence pertinent to this lawsuit can be found anywhere in the State of Texas. As the district court

> astutely observed, the only link between this lawsuit and the State of Texas is the fact that the plaintiffs' counsel maintains his office there.

None of the plaintiffs' countervailing arguments merits consideration beyond that already given them by the court of appeals. Contrary to the impression conveyed by the Petition, the presence of American citizen plaintiffs is not dispositive in a forum non conveniens inquiry. *See Piper Aircraft Co.*, 454 U.S. at 255 n.23. Similarly, the fact that evidence relevant to Boeing's manufacture of the airplane is located in Seattle does not compel the conclusion that the case must be tried in the United States. *See, e.g., Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 17-18 (N.D. Cal. 1982), *aff'd*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983). This is especially true where Boeing has agreed to provide witnesses and documents in Mexico. Finally, the possibility that Mexican law may be less favorable to plaintiffs than Texas law is not a reason for denying a forum non conveniens motion. *Piper Aircraft Co.*, 454 U.S. at 250.

In short, no aspect of the lower court's handling of the forum non conveniens issue departed in any way from the accepted and usual course of judicial proceedings. The court of appeals' affirmance of the district court's forum non conveniens dismissal called for no more than the application of well-settled principles of law to the facts of a particular case.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DAVID RODRIGUEZ DIAZ, et al, Plaintiffs vs. MEXICANA DE AVION, S.A., and BOEING COMMERCIAL AIRPLANE COMPANY, Defendants	*	SA-86-CA-1065 (Filed April 17, 1987)

ORDER

On the 10th day of April, 1987, came on to be heard plaintiffs' motion for reconsideration of this Court's Order of January 23, 1987 dismissing this cause of action based upon forum non conveniens. After consideration of the argument of counsel and the respective briefs of the parties, the Court remains convinced that dismissal was appropriate.

Plaintiffs complain that they were deprived of discovery on the forum non conveniens issue prior to entry of the Order. The record reveals that the motion to dismiss was filed November 12, 1986. Shortly thereafter, plaintiffs requested leave to submit in excess of twenty interrogatories to defendants but did not assert the pending motion as a basis for the additional discovery. On December 5th, Boeing filed a motion to stay discovery.

The motion sought a restraint of discovery as to plaintiffs' substantive claims but not as to the forum non conveniens issue. In fact, counsel for Boeing offered to arrange for the deposition of a witness on this issue. Plaintiffs' memorandum in opposition to Boeing's motion to dismiss, filed almost two months after the motion and well beyond the ten day limit set in the Local Rules, made no mention of the need for discovery. Plaintiffs have never moved to compel the answers to any interrogatories or the production of any documents related to the forum non conveniens issue. Their complaint regarding the denial of discovery is without merit.

Plaintiffs also argue that a remedy in a Mexican forum would not be adequate. Prior to filing their motion for reconsideration, plaintiffs did not contend that Mexican law would make a Mexican forum inadequate. They now claim that litigation in Mexico would last 4 to 6 years because the Mexican government owns the majority of the shares of Mexicana, that there is no cause of action in Mexico against Boeing, and that the recovery against Mexicana is severely limited. The affidavit of Javier Quijano Baz, a lawyer and the president of the Mexican Bar Association, refutes these contentions. He concludes that litigation of this case in Mexico would last 2 to 3 years, an optimistic length of time were the case to remain here. He also testifies that plaintiffs have causes of action against Boeing and Mexicana in Mexico for negligence and strict liability, respectively. Against Boeing, plaintiffs can recover moral damages and economic losses. The monetary recovery against Mexicana though less than that

available in the United States, is not inadequate. If plaintiffs prove reckless and wanton conduct, it is unlimited. The fact that damages may be limited and that there is no strict liability cause of action against Boeing does not make a remedy in Mexico inadequate. *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 254-255, 102 S.Ct. 252, 265, 70 L.Ed.2d 419 (1981). Plaintiffs' fear that a judgment would not be collectable is without merit. Both defendants are insured and have agreed to satisfy any judgment rendered in a Mexican Court. This Court remains convinced that an adequate and available alternative forum exists. The Court has considered all of plaintiffs' arguments and finds them to be without merit.

It is, therefore, ORDERED that plaintiff's motion for reconsideration is DENIED.

SIGNED this 17th day of April, 1987.

/s/ H.F. Garcia
H.F. GARCIA
UNITED STATES DISTRICT JUDGE